NO. 88-1122

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IN THE

Supreme Court of the United States

October Term 1988

BERNHARD GOETZ,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the State of New York

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the trial court's instruction, which merely advised the jury, in a perfectly balanced fashion, both that it "must" convict petitioner if it found all of the elements of the illegal gun charge had been proven beyond reasonable doubt and that it "must" acquit him if it found the proof insufficient to sustain any element of that charge, coerce the jury into returning a verdict of guilty in violation of petitioner's Sixth and Fourteenth Amendment rights to trial by jury?

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BRIEF IN OPPOSITION TO PETITION
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PRELIMINARY STATEMENT

Petitioner Bernhard Goetz, the notorious "subway gunman," seeks a writ of certiorari to review a November 22, 1988 judgment of the New York Court of Appeals. That judgment affirmed a June 28, 1988 order of the New York Supreme Court, Appellate Division, First

Department, which simultaneously affirmed a judgment of conviction and vacated a judgment of sentence entered in New York Supreme Court on October 19, 1987. Following a jury trial, Goetz was found guilty of Criminal Possession of a Weapon in the Third Degree (New York Penal Law §265.02[4] [McKinney 1980]) and sentenced to concurrent terms of six months imprisonment and five years probation.

STATEMENT OF THE CASE

On December 22, 1984, Bernhard Goetz drew an unlicensed revolver from his "quick-draw" holster, and then shot and seriously wounded four teenagers on a New York City subway train, after one of the youths approached him and asked for five dollars. Goetz fled from the subway car and, ultimately, from New York City as well; nine days later, he surrendered

to authorities in Concord, New Hampshire.

New York County grand juries eventually indicted Goetz for attempted murder, assault, reckless endangerment and various weapons offenses. After two years of pre-trial skirmishing and a protracted process of jury selection, Goetz's trial began in late April 1987. On June 16, 1987, a petit jury found petitioner guilty of possessing an unlicensed pistol in the subway car, but acquitted him of all other charges. On October 19, 1987, the trial judge sentenced Goetz to six months imprisonment, fined him $5000 and placed him on five years probation. As conditions of probation, Goetz was directed to undergo psychiatric counselling and perform community service. People v. Goetz, 137 Misc.2d 380, 520 N.Y.S.2d 919 (Sup. Ct. N.Y.Co.

1987). Goetz remained free on bail pending appeal.

On direct appeal to the Appellate Division of New York Supreme Court, petitioner challenged the validity of both his conviction and his sentence. Specifically, Goetz contended that the trial judge's charge, in which he instructed the jury that it "must" convict petitioner if it found the prosecutor had proven, beyond a reasonable doubt, each of the elements of the crime of Criminal Possession of a Weapon in the Third Degree, effectively directed the jury to return a verdict of guilty in violation of his Sixth and Fourteenth Amendment rights, and rights secured by the New York State Constitution.*

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*During its charge, the court outlined the elements of the indictment's thirteen counts. Then, after summarizing

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The Appellate Division rejected petitioner's challenge to the jury instruction and affirmed his conviction.

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*(...continued)
the statutory components of each charge, the court advised the jury that it "must" acquit Goetz if the prosecution failed to prove one or more of those elements beyond a reasonable doubt. Conversely, the jury was instructed that it "must" convict petitioner if it found the prosecution had sustained its burden of proof. The court's exact instruction with respect to the count of Criminal Possession of a Weapon in the Third Degree was as follows:

> Therefore, with respect to count one of the indictment if you find that the People have proved to your satisfaction beyond a reasonable doubt each of the five elements as I have just explained them, then you must find the defendant guilty of the crime of criminal possession of a weapon in the third degree.
>
> On the other hand, if you find that the People have failed to prove to your satisfaction beyond a reasonable doubt, any one or more of these five elements, then you must find the defendant not guilty of criminal possession of a weapon in the third degree.

However, the court agreed that petitioner's sentence was invalid as a matter of state law and remanded the case for resentencing. People v. Goetz, 141 A.D.2d 446, 529 N.Y.S.2d 782 (1st Dep't 1988).

Upon further review, the New York Court of Appeals unanimously affirmed the Appellate Division's determination that the "must" convict instruction violated no state or federal constitutional guarantee. People v. Goetz, 73 N.Y.2d 751, __ N.E.2d __, __ N.Y.S.2d __ (1988). On January 13, 1989, after Goetz filed this petition for certiorari, the trial judge resentenced him to a jail term of one year without ensuing probation, and a fine of $5000. Petitioner has not sought any stay of that sentence and is presently incarcerated.

Petitioner now seeks a writ of certiorari to review that part of the New

York Court of Appeals' decision which held that the "must" convict instruction did not abridge any right to trial by jury protected by the Sixth and Fourteenth Amendments to the United States Constitution.

REASONS FOR DENYING THE WRIT

As a general rule, this Court will grant certiorari only when compelling reasons demand review of a case by the highest tribunal in the land. For example, this Court may grant certiorari if a conflict among the decisions of lower courts results in the inequitable administration of justice across the country, or when a lower court decides an important question of federal law which the Supreme Court has not, but should, settle. Rules of the Supreme Court of the United States, Rule 17 (1988). This case presents no extraordinary

circumstance warranting the investment of this Court's scarce and valuable time.

1. There Is No Conflict Among Decisions Of The Federal Courts of Appeal, Or Between State And Federal Appeals Courts, Which Requires Resolution By The Supreme Court.

Petitioner first urges this Court to grant certiorari to resolve a purported division among the federal courts of appeal, and between the state and federal courts, over the propriety of "must" convict-type jury instructions. But this conflict exists only in petitioner's imagination. In fact, every state and federal appeals court which has addressed the issue has upheld the instruction challenged in this case, or its functional equivalent.*

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*See, e.g., United States v. Kerley, 838 F.2d 932, 940 (7th Cir. 1988) (upholding "should" conviction instruction, (continued...)

The cases cited by Goetz in his

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*(...continued)
where "should" was "imperative," not "hortatory"); United States v. Bejar-Matrecios, 618 F.2d 81, 85 (9th Cir. 1980) (upholding "duty to convict" instruction); United States v. Johnson, 462 F.2d 423, 429 (3rd Cir. 1972), cert. denied, 410 U.S. 937 (1973) (approving "sworn duty to find [defendant] guilty" instruction); Watts v. United States, 362 A.2d 706, 709-11 (D.C. App. 1976) (approving "must find [defendant] guilty" instruction); State v. Ragland, 105 N.J. 189, 519 A.2d 1361, 1366-69 (1986) (approving "must find [the defendant] guilty" instruction); State v. Maloney, 126 N.H. 235, 490 A.2d 772, 775 (1985) (upholding "must return verdict of guilty" instruction; although "should" convict preferable, use of "must" was "immaterial and harmless"); Commonwealth v. Fernette, 398 Mass. 658, 500 N.E.2d 1290, 1297-98 (1986) (approving "must return verdict of guilty" instruction); State v. Devoe, 301 A.2d 541, 545-46 (Me. 1973) (approving "must find" defendant guilty instruction); Straughter v. State, 247 A.2d 202, 203-04 (Del. 1968) (upholding "must" convict instruction); People v. Cargile, 83 Mich. App. 361, 268 N.W.2d 258, 259 (1978) (approving "should" convict instruction); State v. Lovelace, 227 Kan. 348, 607 P.2d 49, 55 (1980) (approving "must" convict instruction; "no substantial difference" between "must" and "should"); State v. Foyte, 43 Idaho 459, 252 P. 673, 674 (1927) (approving "duty to find" defendant guilty instruction).

petition for certiorari (Petition at 16-17), which purportedly are contrary to the many decisions recited above, do not in fact conflict with any of those holdings. In United States v. Hayward, 420 F.2d 142 (D.C. Cir. 1969), for example, a murder defendant presented an alibi defense. The trial court charged the jury that "if ... you find that the Government has proved beyond a reasonable doubt that the Defendant was present at the time when and at the place where the offense charged was committed, then you must find the Defendant guilty" (emphasis in original). Politely characterizing the trial court's use of the word "must" an "honest oversight," the D.C. Circuit reversed the conviction, holding that the charge had trenched upon Hayward's Sixth Amendment right to a trial by jury. Id. at 144.

However, even a casual reading of the Hayward opinion discloses that the constitutional error identified there lay not in the trial judge's use of "must" convict language; what was wrong was the context in which that mandatory term was employed. The appeals court concluded that the charge was objectionable because, in practical effect, it directed the jurors to convict if they merely found that the defendant was present at the scene when the murder took place, without regard to whether the prosecution had established any or all of the statutory elements of the crime of murder. Nothing in Hayward can be read to condemn an instruction which simply reminds a jury of its duty to convict where all elements of an offense have properly been proven beyond reasonable doubt.

Similarly, Brascomb v. State, 261 Ark. 614, 550 S.W.2d 450 (1977), faulted an instruction which stated that the jury "should" convict if it found that the defendant committed the offense. The defendant had asserted an entrapment defense which involved an admission that the offense took place. The Arkansas Supreme Court rightly held that the instruction was erroneous because it effectively foreclosed the jury from considering the merits of the entrapment claim. Brascomb did not hold that a mandatory instruction properly embracing all of the facts of the case, all elements of the crime and all defenses would have been improper.*

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*Petitioner also relies upon People v. Gillespie, 54 Mich. App. 419, 221 N.W.2d 246 (1974), but reads too much into the unusual facts underlying that intermediate appeals court opinion. In fact, only four years later, the same court approved an instruction

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In short, there is not now -- and never has been -- the slightest conflict of opinion among the federal and state appeals courts about the constitutionality of the kind of instruction delivered to petitioner's jury. Thus, it is totally unnecessary for this Court to seize the opportunity afforded by this case to proclaim a uniform rule of constitutional procedure applicable throughout the land.

2. This Case Presents No Important And Unsettled Question Of Law Deserving Of Review By The Supreme Court.

No more persuasive is Goetz's suggestion that his petition raises an unresolved question of law of vital importance to the administration of

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*(...continued)
admonishing a jury that it "should" convict an accused where guilt has been proven beyond reasonable doubt. People v. Cargile, 83 Mich. App. 461, 268 N.W.2d 258 (1978).

criminal justice. In fact, for more than 150 years, members of this Court, and the Court itself, have repeatedly approved jury instructions not markedly different from the one upheld by the New York Court of Appeals. Thus, even in the absence of an explicit holding from this Court, the constitutional propriety of the challenged instruction cannot be seriously disputed.

Beginning at least as early as 1821, Justices of this Court, while presiding over criminal trials in the old federal circuit courts, routinely charged juries that they were under a duty to find an accused guilty where the prosecution satisfied its burden of proof.*

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*See, e.g., United States v. Bennett, 24 F. Cas. 1093, 1102 (C.C.S.D.N.Y. 1879)(No. 14,571)(Blatchford, J.)("it will be your duty to find the prisoner guilty if

(continued...)

Concededly, in none of those cases did the Circuit Justice expressly reject the constitutional contentions advanced in Goetz's petition. Nevertheless -- particularly in the context of an allegation that a commonplace jury instruction deprives an accused of familiar and fundamental constitutional

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*(...continued)
United States v. Gleason, 25 F. Cas. 1335, 1338 (C.C.D. Iowa 1867) (No. 15,216) (Miller, J.)("it is your duty to say so [i.e., pronounce defendant guilty] by your verdict"); United States v. Baker, 24 F. Cas. 962, 965 (C.C.S.D.N.Y. 1861)(No. 14, 501)(Nelson, J.)("duty to convict"); United States v. Keene, 26 F. Cas. 694, 695 (C.C.D. Ill. 1853)(No. 15, 512)(McLean, J.) ("you will find the defendant guilty"); United States v. McGlue, 26 F. Cas. 1093, 1097 (C.C.D. Mass. 1851)(No. 15, 679)(Curtis, J.)("you will find him [defendant] guilty"); United States v. Mitchell, 26 F. Cas. 1276, 1277 (C.C.D. Pa. 1831)(No. 15, 787)(Baldwin, J.)("you will find [defendants] guilty"); United States v. Jones, 26 F. Cas. 644, 648 (C.C.D.N.Y. 1824) (No. 15, 493) (Thompson, J.)("duty to say so [i.e., pronounce defendant guilty]"); United States v. Kennedy, 26 F. Cas. 762 (C.C.D. Pa. 1821) (No. 15,525) (Washington, J.) ("should find [defendants] guilty").

rights -- the unwavering historical acceptance of peremptorily-phrased charging language by so many members of this nation's constitutional court of last resort assumes telling significance.

Far more importantly, this Court as a collegial body gave that historical practice a ringing endorsement in Sparf v. United States, 156 U.S. 51 (1895). In an exhaustive and seminal opinion exploring the constitutional relationship and allocation of power between the judge and the jury in a criminal case, Justice Harlan cited with unqualified approval state court instructions advising jurors that they "must" or had a "duty" to convict where the prosecution met its burden of proof. Id. at 85. This Court has never retreated from that view. To the contrary, since Sparf this Court has repeatedly quoted, without the slightest

disapproval, jury instructions not materially different from the one delivered to petitioner's jury. See, e.g., Killian v. United States, 368 U.S. 231, 249 n.5 (1961) ("must find the defendant guilty"); United States v. Kozminski, 108 S.Ct. 2751, 2774 (1988) ("your verdict will be guilty").

In light of the foregoing authorities, it should be readily apparent that the question presented in Goetz's petition involves no open and troubling issue of law demanding this Court's attention. Still, Goetz insists that a jury instruction which this Court has repeatedly endorsed is constitutionally flawed. The essence of his argument seems to be that the mandatorily-cast, "must" convict instruction coerced his jury into returning a guilty verdict and therefore deprived him of his right to a trial by

jury. This thesis is legally untenable and logically unsound; the New York Court of Appeals was surely correct in repudiating it.

In the first place, although petitioner speculates that a "must" convict instruction improperly pressures juries into returning guilty verdicts, it is far from self-evident how or why that phenomenon should occur. As a matter of logic, it is extremely difficult to fathom how a jury is coerced, one way or the other, by an instruction that merely bespeaks a duty to return a verdict of guilty if the prosecutor proves his case beyond a reasonable doubt, and a corresponding duty to acquit if the evidence falls short of that constitutional threshold. In truth, such an instruction is perfectly neutral, and no more coerces a conviction than it does an acquittal. Indeed, complete proof that

Goetz's jury was not coerced by the trial court's language into unjustly convicting him is readily at hand: although the presiding judge employed similar language when he summarized the elements of the twelve other counts in the indictment, the jury acquitted petitioner on all of those charges.

Justice Holmes' opinion in Horning v. District of Columbia, 254 U.S. 135 (1920), further demonstrates how spurious petitioner's constitutional objections are. In Horning, the trial judge charged the jury, among other things:

> that there really was no issue of fact for them to decide;... that the course of dealing constituted a breach of the law; that it was their duty to accept this exposition of the law; that in a criminal case the Court could not peremptorily instruct them to find the defendant guilty but that if the law permitted he would;... that a failure to bring in a verdict could only

> arise from a flagrant disregard of the evidence, the law, and their obligation as jurors;... that he could not tell them in so many words to find the defendant guilty but that what he said amounted to that; that the facts proved were in accord with the information and that the Court of Appeals had said that that showed a violation of law. Id. at 137-38.

In upholding the foregoing instructions, Justice Holmes unequivocally ratified the trial judge's "right and duty" to direct what verdict a criminal jury should render upon certain facts:

> The facts were not in dispute, and what he did was to say so and to lay down the law applicable to them. In such a case obviously the function of the jury if they do their duty is little more than formal. The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts. But the judge always has the right and duty to tell them what the law is upon this or that state of facts that may be found, and he can do the same none the less

when the facts are agreed. Id. at 138.

Horning demolishes the notion, crucial to petitioner's argument here, that there is a distinction, of constitutional dimension, between a jury's finding that all elements of a charge have been proven, and the "ultimate guilt" of an accused (Petition at 8, 14). Under our constitutional scheme, a jury's fact-finding responsibility ends once it determines that the prosecution has fulfilled its burden of proof on a particular charge, because that is all that is necessary to establish the accused's guilt. "Ultimate guilt" is not a separate and additional fact that the jury must also find before convicting a defendant.

Undoubtedly, it is the sole and exclusive responsibility of the petit jury in every criminal trial to decide

whether the prosecution has proven the factual elements of any crime. The trial judge so charged the jury that convicted petitioner, and petitioner does not contend otherwise. But once the jury completes that fact-finding inquiry, it is within the constitutional province of the court to determine, as a matter of law, what legal consequences flow from the jury's findings. The judge may do this either by charging the jurors, as was done in this case, that they are duty-bound to convict the accused if they find that certain facts have been proven, or by the court itself entering a special verdict of guilty upon the jury's answers to special interrogatories. See United States v. Buzzo, 85 U.S. (18 Wall.) 125 (1873); United States v. Jackalow, 66 U.S. (1 Black) 484 (1861). In neither case does the court trespass, to even the slightest extent, upon the

constitutionally protected fact-finding power of the petit jury. Certainly, such action does not amount to the unlawful direction of a guilty verdict.

In sum, the decision of the New York Court of Appeals, upholding the "must" convict instruction, was faithful to the jurisprudence of this Court extending back over 150 years, and fully comported with the guarantees of trial by jury and due process of law. As a uniform body of caselaw from both state and federal courts attests, there was nothing unique, or even unusual, about the Court of Appeals' determination of the question presented by Goetz. Since that is so, his petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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